Nos. 82-1771, 82-963, and 82-1711

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,
v.
ALBERTO ANTONIO LEON, et al.,
Respondents.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
OSBORNE SHEPPARD,
Respondent.

STATE OF COLORADO,
Petitioner,
v.
FIDEL QUINTERO,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit,
The Supreme Judicial Court of Massachusetts, and
The Supreme Court of Colorado

BRIEF FOR AMICI CURIAE BAR ASSOCIATION OF SAN FRANCISCO AND BAR ASSOCIATION OF BEVERLY HILLS

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QUESTION PRESENTED

Can evidence obtained by law enforcement officers in violation of the fourth and fourteenth amendments be admitted into evidence upon a finding that it was obtained in "good faith."

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U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. XIV ..... *passim*

Other Authorities

Benenson, Court Backlog, Congressional Quarterly Editorial Research Report, Vol. II, No. 13 (1983).... 9

B. Cardozo, The Nature of the Judicial Process (1960) 19

Comp. Gen. Rep. No. GGD-79-45, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (1979) 10

E. Devitt & C. Blackmar, Federal Jury Practice and Instructions (1977) 5

J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980) 4, 19

1 W. LaFave, Search and Seizure: A Treatise on The Fourth Amendment (1983 Supp.) 8

The Recorder, Nov. 3, 1983 15

L. Tiffany, D. McIntyre, Jr., & D. Rotenberg, Detection of Crime (1967) 8

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INTEREST OF THE BAR ASSOCIATION OF SAN FRANCISCO AND THE BAR ASSOCIATION OF BEVERLY HILLS

The 7,600 members of the Bar Association of San Francisco and the Bar Association of Beverly Hills include many experienced criminal practitioners on both sides of the bar and many who practice in the urban criminal courts and the smaller courts in suburban and rural counties throughout California.[1]

Amici have been vigorously interested in sound police procedures and balancing the need for efficient and effective law enforcement with the rights of citizens. Amici file this brief because of concern that any "good faith" exception will let down the barriers to unconstitutional law enforcement, send a signal that courts should be less vigilant in protecting constitutional rights, and return day-to-day law enforcement to a system including too frequent fourth amendment violations, such as occurred prior to *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955) (exclusion required in California state courts) and *Mapp v. Ohio*, 367 U.S. 643 (1961). The Associations' members have a long history of observing and participating in programs aimed at regulating police procedures and, for the reasons stated in this brief, have concern about a return to legal rules that tacitly condone fourth and fourteenth amendment violations. If this Court is prepared to forgive a fourth amendment violation, there is no reason why a local police administrator should not do the same.

Of equal concern are the inevitable additional burdens that will be placed on already overburdened state and federal judges in ruling on suppression motions under the proposed two-tiered, "good faith" system.

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[1]Pursuant to Supreme Court Rule 36.2, amici curiae Bar Association of San Francisco and Bar Association of Beverly Hills have obtained the written consent of counsel for the parties in Nos. 82-1771, 82-963, and 82-1711.

SUMMARY OF ARGUMENT

The fourth amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects" by prohibiting "unreasonable searches" and requiring that warrants be issued only "upon probable cause" and "particularly describ[e]" the place to be searched and things to be seized. U.S. Const. amend. IV. These fundamental guarantees are enforced by excluding, from trial, evidence obtained in violation of the fourth amendment in order to deter future violations. *Mapp v. Ohio*, 367 U.S. 643 (1961); *United States v. Calandra*, 414 U.S. 338 (1974).

In these three cases, the government[1] has proposed that this Court create an exception to the exclusionary rule to apply where police and magistrates violate the fourth amendment in "good faith." Under the government's proposed "reasonable mistake" exception, evidence obtained in violation of the fourth amendment would nonetheless be admissible at trial if the concededly unconstitutional acts were in "subjective good faith" and were "grounded in objective reasonableness" (Br. 78).

This two-tiered,[2] "good faith" analysis should be rejected, precisely because it is hopelessly inconsistent with the goal of deterring fourth amendment violations. The proposed "good faith" exception will be difficult for police to understand and burdensome for courts to apply, and will result in serious erosion of fourth amendment protections.

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[1]For convenience, as used in this brief, "government" collectively refers to the United States of America, the State of Colorado, and the Commonwealth of Massachusetts, and "Br." refers to the brief filed in these cases by the Solicitor General of the United States.

[2]"Two-tiered," as used in this brief, refers to a bifurcated analysis under which a court would determine: (i) whether the fourth amendment had been violated; and (ii) whether the violation was in "good faith." In addition, the government has suggested a further bifurcation of "good faith" itself into "subjective good faith" and "objective reasonableness."

A "good faith" exception will also tacitly encourage police to flout fourth amendment requirements. Rather than furthering fourth amendment values, a "good faith" exception, if recognized, would seriously undermine the deterrent value of the exclusionary rule.

The shortcomings of the proposed "good faith" exception outweigh the government's highly speculative exposition of its merits. Contrary to the government's claims, suppression of illegally seized evidence is constitutionally mandated, *Mapp, supra,* at 655-56, and is an effective system-wide deterrent. Moreover, as these cases demonstrate, suppression is necessary to regulate the conduct of magistrates as well as police officers. Finally, the asserted need for a "good faith" exception is effectively undercut by the limited retroactivity accorded to this Court's decisions clarifying fourth amendment rights. *United States v. Johnson,* 457 U.S. 537 (1982); *Michigan v. DeFillippo,* 443 U.S. 31 (1979).

The government's invitation to recognize a "good faith" exception should accordingly be rejected as a dangerous and undesirable dilution of the fourth amendment.

ARGUMENT

I

A "GOOD FAITH" EXCEPTION WILL UNDERMINE DETERRENCE AND BURDEN THE COURTS

A. Deterrence

This Court has recognized that an exclusionary rule is necessary to breathe life into the fourth amendment, so that its protections are meaningful. This Court has therefore insisted on the exclusion of evidence obtained in violation of the fourth amendment, to deter such violations.

Accordingly, it is fair to ask how the goal of deterrence will be served by a two-tiered, "good faith" rule.[4]

First, a two-tiered system will be more complex and therefore less comprehensible to the policeman on the street. To current complexities will be added a "good faith" escape hatch—a lenient-sounding new rule that by its very name is an invitation to police officers to care less about fourth amendment violations. Deterrence is in large part a problem of information and training. Its object is to inform well-motivated officers of constitutional rights. A two-tiered system is undesirable because it injects an uncertain subjectivity into that process. Simply put, the "good faith" exception will be as difficult to explain to police officers as it was for the government to explain to this Court.

Compounding this problem, the new rule will send the lower courts on a convoluted mission to identify and define a second tier of "good faith." The twelve federal circuits would have twenty-four levels of analysis branching out to cover a myriad of lesser issues with inevitable conflicts and

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[4]For those constitutional thinkers who hold to the theory that language in the Constitution should be given a literal meaning, *see, e.g.*, J. H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-9 (1980), the Court's focus on deterrence as the sole justification for exclusion would seem out of place given the clear language of the fourth amendment:

> The right of the people to be secure in their persons, houses [*Sheppard* and *Leon*], papers and effects against unreasonable searches and seizures [*Quintero*] shall not be violated and no warrants shall issue, but upon probable cause [*Leon*], supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized [*Sheppard*].

As recognized by Justice White in his concurrence in *Illinois v. Gates*, the "imperative of judicial integrity" runs "along with . . . the deterrence concept, and . . . to focus upon the latter is to promote, not denigrate, the former." U.S. . . , 103 S. Ct. 2317, 2343 n.14 (1983) (White, J., concurring).

confusion. Complexity by itself is a good reason not to sanction such a rule.

Second, deterrence will be undercut by the inherently unwieldy nature of the proposed "good faith" test, which necessarily looks to the officer's state of mind.[8] State of mind is a torturous standard to satisfy. A typical jury instruction on proof of intent reads in part:

> Intent ordinarily may not be [illegible]tly because there is no way of [illegible] or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 81.03 (1977).

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[8]Although the government characterizes the "good faith" standard as "objective reasonableness" (Br. 80), it relies heavily on *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981), as an example of the "type of focused exception responsive to . . . the exclusionary rule" that is here advocated (Br. 45). Contrary to the government's claims, *Williams* rests upon a "good faith" formulation that contains a subjective, as well as an objective, component. As there discussed, a showing of "good faith" involves both the officer's *belief* that his conduct is constitutional and a *reasonable* basis for that belief. 622 F.2d at 840. Indeed, the Fifth Circuit's professed rationale for the "good faith" exception—the absence of deterrence value—rests upon the argument that "the officer whose future actions are to be affected *will not realize his actions are wrongful*," *id.* at 842 (emphasis added).

Moreover, the second prong of the *Williams* "good faith" test—what the government characterizes as the reasonably well-trained officer test (Br. 79)—is close to a negligence concept, with all the difficult decision-making that negligence has spawned. *See Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 660, 320 P.2d 500 (1958) ("The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand.").

By focusing on the officer's state of mind, a "good faith" standard will require the trial courts to resolve difficult subjective disputes. What did the officers think in *Quintero*? Did the officers understand the inadequacy of the warrant because of staleness and unreliability in *Leon*? Did the officers realize that the things to be seized were not listed in *Sheppard* as required by the explicit language of the fourth amendment? Although the government characterizes the "good faith" standard as "objective reasonableness" (Br. 80), in fact the focus is on the officer's state of mind, which will necessitate a subjective inquiry in every case. *Cf. Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (proof of intent to discriminate "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available").[6]

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[6]In fact, findings of "good faith" have not been made in these three cases. There was no finding in *Quintero* that the arresting officer acted in "good faith," and the Colorado Supreme Court held that while the arresting officer may have believed the arrest was proper, "[s]uspicion does not amount to probable cause" (Br. 17). Similarly, in *Sheppard*, although the government contends that the officer "thought the warrant was valid" (Br. 12), there was no finding as to whether his failure to review the warrant, which was clearly defective on its face, prior to conducting the search amounted to "good faith." Indeed, two Justices of the Massachusetts Supreme Judicial Court held that "the search warrant was so defective that neither the police nor the issuing judge could be said to have acted in reasonable good faith" (Br. 15). Finally, although the trial court in *Leon* loosely referred to the officer's "good faith" (Br. 8), the government fails to identify any inquiry by the trial court as to whether the officer was aware that the warrant application did not establish probable cause for the search. The trial court specifically noted that there was "no question" that the reliability and credibility of the informant had not been established (Br. 7), something the officer must surely have known. On the face of it, no one could think that five-month-old information is reliable in a narcotics case.

Such an inquiry into "good faith" can also be expected to embrace a host of considerations well beyond the officer's state of mind at the time the arrest was made or the search was executed. For example, in how many other suppression hearings has the officer been involved? What conduct and constitutional issues were the subject of those prior hearings? What kinds of compliance programs were available to the officer? Did he or she attend them regularly? How well did the officer do at the programs?

Third, the "good faith" exception will send a message to police officers that is hopelessly inconsistent with deterrence. "Good faith" sounds like a loosening of the system —a tolerance and acquiescence, a judicial shrug to fourth amendment violations. Such a signal would weaken constitutional protections. For example, viewed by a policeman or a police administrator, admission of evidence in the three cases before the Court is likely to be interpreted as the judicial sanctioning of: (i) the use of stale and unreliable information in warrant applications *(Leon);* (ii) arrests without probable cause to believe a crime has been committed *(Quintero);* and, (iii) the use of warrants that do not describe the things to be seized *(Sheppard).* Moreover, the "good faith" test is at best superfluous since, as this Court has repeatedly noted, the probable cause requirement of the fourth amendment already focuses on the reasonableness of the officer's or the magistrate's actions. *See, e.g., Illinois v. Gates,* ..... U.S. ....., 103 S. Ct. 2317, 2328 (1983). If "good faith" means something other than reasonableness, the only purpose of a "good faith" test is to ratify conduct that by definition is unreasonable.

Similarly, opening the door to a "good faith" standard is an invitation to courts to fashion many innovative, lenient, "good faith" rulings. If the "good faith" exception is to be narrowly applied, as the government hints at, it will be of little value. If it will support many lenient rulings, deterrence will be seriously undermined.

Fourth, the two-tiered, "good faith" standard will lessen deterrence, since the trial court will, in effect, be required to find "bad faith" to suppress. The stigma attached to an officer by such a finding will not be imposed by many judges or in many cases. This major inhibiting effect will impinge not on "technical, trivial or inadvertent violations" only, *Brewer v. Williams*, 430 U.S. 387, 413-14 n.2 (1977) (Powell, J., concurring), but will further impair the courts' ability to safeguard fourth amendment values.

Fifth, a rule that validates any warrant, no matter how defective, by "good faith" reliance will promote magistrate shopping, thereby short-circuiting deterrence. *See* 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.2 at 9 (Supp. 1983); L. Tiffany, D. McIntyre, Jr. & D. Rotenberg, Detection of Crime 120 (1967). The latter authors, based on field studies, *ibid.* at xii, found that police officers in multi-judge courts actively shop for "lenient" magistrates:

> In one city, for example, a magistrate was contacted at his home for a search warrant despite the fact that other magistrates empowered to issue a warrant were available at the courthouse. This practice sometimes backfires when police go before a different judge for trial and he grants a motion to suppress the evidence because he believes the original search warrant should not have been issued.

Id. at 120. For deterrence to be effective, it must be aimed at officers who seek ways around the rules[1] as well as the great majority who try to conform to the Constitution.

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[1]Such outright manipulation is not tolerated elsewhere in the judicial system. For example, case assignments in multi-judge courts are typically made on a rotation basis, rather than at a litigant's whim. Similarly, this Court has developed an elaborate body of law under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), to discourage forum shopping by plaintiffs.

B. Burden on the Courts

A two-tiered, "good faith" test will place unacceptable burdens and constraints on trial and appellate courts.

At the trial court level, it should be apparent that the "good faith" test will exponentially expand the scope of suppression hearings, increasing the burdens on already overburdened trial courts. Concern about overburdening courts, which seemed so hypothetical in the 1950's and 1960's, no doubt is of grave concern to this Court in the 1980's. Work loads in the federal courts have increased dramatically. *See generally* Benenson, *Court Backlog, Congressional Quarterly Editorial Research Report,* Vol. II, No. 13, 743-45 (1983). The proposed rule would increase trial court work loads even further. Nor can any lessening of the number of suppression motions be anticipated by the use of a "good faith" test, since such motions are brought by defense counsel in any case in which evidence might be suppressed.

The probable impact of the proposed "good faith" exception on appellate court work loads is less clear. The objective component of the "good faith" test is likely to create new burdens at the appellate level. Trial court "good faith" determinations based on the reasonableness of a police officer's or magistrate's actions will require the appellate courts to explain and harmonize a wide range of decisions. The appellate courts will thus be compelled to create a new, second tier of fourth amendment jurisprudence.[8]

The subjective component of the "good faith" test, on the other hand, threatens to choke off appellate review of

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[8]The government downplays this point, contending that the "good faith" standard will enable courts to *avoid* novel fourth amendment issues of a fact-specific nature (Br. 82-86). But that result is even worse than adding to appellate court work loads, since it would lead to the atrophication of the fourth amendment.

fourth amendment decisions. Trial court findings of fact regarding subjective "good faith" will insulate suppression decisions from appellate review, and seriously impair this Court's ability to fine-tune constitutional requirements. This Court has already placed a significant portion of the responsibility for overseeing fourth amendment violations in the hands of trial court judges. *See Stone v. Powell*, 428 U.S. 465 (1976). A "good faith" exception, if recognized, will simply expand the range of trial court decisions that are beyond appellate review.

II

THE GOVERNMENT'S SUGGESTED REASONS FOR A "GOOD FAITH" EXCEPTION ARE WITHOUT MERIT

The government has suggested seven reasons for a "good faith" rule (Br. 22-24). Each is faulty.

First, the government suggests that relevant and trustworthy evidence is excluded (Br. 22). The fourth amendment itself assumes limitations on the ability to gather evidence, and this is for the best of all reasons. In a constitutional democracy, the government is limited in what it can do to secure evidence. When this central principle is forgotten or brushed over, it is logically attractive to imagine a rule that would allow arrests of citizens when there is no probable cause to believe that a crime has been committed. But the harm done to personal freedom by such a rule would be extreme. While the number of cases where crucial evidence is currently excluded is relatively small, *see* COMP. GEN. REP. No. GGD-79-45, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 11 (1979) (evidence excluded in only 1.3% of cases studied), the number of improper arrests allowed by a "good faith" rule is potentially enormous.

Second, the government suggests that the present rule only benefits the criminal, at least in cases like these three (Br. 22-23). But system-wide deterrence will result from the application of the exclusionary rule to these three cases. In *Sheppard*, magistrates and officers would understand that warrants must specify the things to be seized. In *Leon*, magistrates and officers would understand that stale and unreliable evidence will not supply probable cause. And in *Quintero*, officers would understand that arrests cannot be made where there is no probable cause to believe that a crime has been committed.

Moreover, the government's argument on deterrence is unsupported and inconsistent—unsupported when it says there are no "meaningful comparative statistics showing the effect the exclusionary rule has had upon police conduct" (Br. 40), and inconsistent when it says that the rule would be as likely to deter lawful conduct (Br. 23-24). Does the government mean to suggest that a police administrator explaining the *Quintero* case to a class of officers would have no effect on them and their procedures? The government's argument is nothing more than an invitation to this Court to adopt a posture of false modesty. It is precisely because most officers *will* follow the courts and constitutional mandates that deterrence is a modern reality, witnessed and recognized by most and doubted only by an occasional brief writer.

Third, the government suggests a diminished public respect (Br. 23). Unsupported, this idea urges the conception of a citizenry interested only in total law enforcement. One can as easily say that respect for the police is diminished by the use of insufficient warrants or arrests unsupported by probable cause. Implicit in this point is the question of what the values of our citizens should be. It would be unacceptable to most to make decisions in criminal cases based on the wishes of an actual crowd. It would be worse

to make such decisions based on the suspected but unproven wishes of a whole population.

Fourth, the government suggests a lack of "proportionality" in suppression (Br. 23). There is an almost too synergistic understanding between the government's brief and the conduct of law enforcement officials. The government's brief is permeated with forgiveness. But how appropriate is that given the cases. In *Quintero*, the police acted without any semblance of probable cause, arresting the defendant for no other reason than that he was waiting for a bus holding a television set, and a neighbor thought he looked "nervous." In *Sheppard*, the police executed a search pursuant to a jerry-rigged warrant without even bothering to confirm whether it was properly filled out. And in *Leon*, the police submitted a warrant application that was hopelessly inadequate under both prongs of the *Aguilar-Spinelli* test.[9] Such police conduct implicates the very core of fourth amendment values; it is not a "trivial" or "technical" transgression that can be chalked up to a "good faith" misunderstanding.

Fifth, the government's suggestion that the present rule deters *lawful* conduct (Br. 23-24) is unsupported and unlikely. And sixth, the government's suggestion that the "good faith" exception will help ease court work loads (Br. 24) is equally unsupported and unlikely for the reasons given above. *See* discussion at page 9, *supra*.

Finally, the government suggests that judges do not follow the law because of the "extreme consequences" of finding a violation of the fourth amendment (Br. 24). Not only is this assertion unsupported, but it is of dubious validity. The government argues that the "good faith" exception should be adopted because it would free courts from the need to decide hard cases (Br. 83). It is only by

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[9]*Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

deciding difficult fourth amendment cases, however, that the courts assure that its protections receive more than lip service.

III

DETERRENCE HAS APPLIED AND SHOULD APPLY TO MAGISTRATES AS WELL AS OFFICERS

In two of the cases, *Leon* and *Sheppard,* the government's argument comes down to this: the focus should be on only the officers who obtained the warrant and who therefore behaved in "good faith" because they had complied with the fourth amendment (Br. 57). The government thus attempts to exclude magistrates from the fourth amendment's coverage.

Nothing in the language of the fourth amendment, however, even remotely suggests that deterrence of magistrates is not required or desirable. The focus of the fourth amendment is on "the right of the people to be secure. . . ." On one level, it can be said that it does not matter to "the people" that an officer entering their home in violation of the fourth amendment does so in "good faith" reliance on an invalid warrant. The right is equally diminished, regardless of whether it is the officer or the magistrate who failed to comply with the fourth amendment.

Contrary to the government's tacit exemption of magistrates, this Court has held that magistrates are subject to the fourth amendment's coverage. *See Lo-Ji Sales, Inc. v. State of New York,* 442 U.S. 319 (1979). In that case, a magistrate issued a search warrant for pornographic materials which were neither specifically listed nor described in the warrant. Instead of describing the items, the magistrate accompanied the police to the defendant's store, where the magistrate reviewed various merchandise over a six-hour period, ultimately ordering the seizure of 397 magazines and 431 reels of film. An inventory of the seized items was then prepared by the police and attached to the search warrant.

This Court unanimously held that contrary to the trial court and appellate decisions below, the seized evidence should have been suppressed, because the magistrate's warrant failed to "'particularly describ[e] . . . the . . . things to be seized'" as required by the fourth amendment. 442 U.S. at 325. In response to the state's claim that the magistrate's participation somehow validated the search, the Court noted that the magistrate did not act with the requisite "neutrality and detachment demanded of a judicial officer when presented with a warrant application. . . ." *Id.* at 326 (citation omitted). *Lo-Ji* is thus bottomed on the magistrate's failure to comply with the fourth amendment.[10] *See also Illinois v. Gates,* ..... U.S. ....., 103 S. Ct. 2317, 2345 (1983) (White, J., concurring) (exclusionary rule applies where "it is plainly evident that a magistrate . . . had no business issuing a warrant"); *People v. Potwora,* 48 N.Y.2d 91, 397 N.E.2d 361, 364 (1979) (evidence suppressed "where the magistrate merely acts as a rubber stamp" because "the person who possesses the authority [must] be answerable for its exercise").

Since deterrence is the rationale for suppression, it is well applied to magistrates, who will follow the case law and who do not wish to be responsible for the exclusion of evidence. *Sheppard* is a case in point. The government

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[10]Moreover, the Court squarely rejected any suggestion that the magistrate's "good faith" somehow rehabilitated the search:

> We need not question the subjective belief of the [magistrate] in the propriety of his actions, but the objective facts of record manifest an erosion of whatever neutral and detached posture existed at the outset.

Id. at 326-27. Although in *Gates,* Justice White suggested without citation that "the exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges," 103 S. Ct. at 2345, that proposition seems inconsistent with *Lo-Ji, supra,* where evidence was suppressed precisely because the *magistrate* blundered.

attempts to create a mood of understanding (Br. 67-68), to allow this Court to acquiesce in a defective warrant. But how understandable or forgivable are the actions of the magistrate? How desirable or tolerable is it to have a magistrate discharge important responsibilities concerning the issuance of warrants by the use of forms? If the founding fathers thought that "particularly describing the . . . things to be seized" was important enough to be spelled out in the Constitution, the courts should not diminish that requirement by allowing the use of evidence seized by use of a warrant which on its face does not comply. Where is the "good faith" of the magistrate, or the officers for that matter, in issuing or using a defective warrant, when the best that can be said is that they did not read it or did not notice that it was not in compliance with the clear, unambiguous, 200-year-old language of the fourth amendment.[11]

Sheppard gives the Court a good, if disturbing, view of the potential harm to be done by a rule that would immunize magistrates' acts from this Court's review. The government's argument is seen here for what it is—not an argument that deterrence of the magistrate would not be effective, for it surely would be, but an argument that deterrence is not important.[12]

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[11]Contrary to the suggestion of the government, there is nothing unusual about a Sunday warrant. All urban courts regularly are asked to issue warrants on Sunday and most make the arrangements to do so. For example, as reported in the official newspaper for the Superior Court for the City and County of San Francisco, a judge is designated each week to issue warrants "during the weekend and non-court hours." *See, e.g.*, The Recorder, Nov. 3, 1983, at 3, col. 2 (designation for week of Oct. 31, 1983).

[12]It is particularly important to require suppression when magistrates exceed the limits of the fourth amendment since magistrates discharging their official duties are immune from civil liability, *see Pierson v. Ray*, 386 U.S. 547, 553-55 (1967); *Timmerman v. Brown*,

IV

A "GOOD FAITH" EXCEPTION IS UNNECESSARY BECAUSE NEW FOURTH AMENDMENT DECISIONS ARE PROSPECTIVE ONLY OR OF SHARPLY LIMITED RETROACTIVITY

The government argues that evidence obtained in a "good faith" violation of the fourth amendment should not be excluded because the police are often unable to determine the scope of permissible activity (Br. 49-53). This Court's practice of retroactively applying new fourth amendment decisions on a limited and carefully circumscribed basis militates strongly against the necessity of a "good faith" exception.

In *United States v. Johnson*, 457 U.S. 537, 549 (1982), the Court confirmed that new fourth amendment decisions representing "a clear break with the past" are not applied retroactively. *See also Michigan v. DeFillippo*, 443 U.S. 31, 37-38 (1979) (evidence admissible because arresting officer "should not [be] required to anticipate that a court would later hold the ordinance unconstitutional"); *United States v. Peltier*, 422 U.S. 531, 547 n.5 (1975) (Brennan, J., dissenting) (collecting cases).

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528 F.2d 811, 812-15 (4th Cir. 1975), rendering suppression the only available deterrent. *Cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

By emphasizing deterrence of magistrates, we do not suggest that suppression is necessarily required in every case where a warrant fails to comply with the fourth amendment. Suppression would be inappropriate in a case in which a warrant is based on a statute that is later held to be unconstitutional. *See Michigan v. DeFillippo*, 443 U.S. 31 (1979). Similarly, a mere typographical error in the address of the premises to be searched does not require exclusion. *See United States v. Gitchc*, 601 F.2d 369 (8th Cir.), *cert. denied*, 444 U.S. 871 (1979).

In *Johnson*, the Court separately addressed the rule of retroactivity in a second class of cases—those not representing a "clear break." The Court held that in such cases a limited rule of retroactivity, applying only to convictions not yet final at the time a new decision is rendered, is required *in order to deter fourth amendment violations by the police.* 457 U.S. at 561-62. Writing for the Court, Justice Blackmun explained that limited retroactivity was necessary because police must have an

> incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach."

Id. at 561 (footnote and citation omitted; emphasis in original).

Thus, the government's proposed "good faith" exception is unnecessary and inappropriate.[13]

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[13]Moreover, the "good faith" exception, coupled with the rule of limited retroactivity, could lead to inconsistent results in some cases. For example, a defendant who mounted a successful challenge to an unconstitutional arrest or search might be denied the benefit of the new rule, because the officers were found to have acted in "good faith." However, the convictions of other defendants, which were not yet final, might be reversed under a retroactive application of the new rule. Such an anomalous result is unfair and undesirable.

V

THE EXCLUSIONARY RULE IS CONSTITUTIONALLY MANDATED AND NOT "MERELY" A RULE OF EVIDENCE

For three related reasons, this Court has repeatedly recognized that suppression of illegally seized evidence is an integral part of the rights secured by the fourth amendment. First, the language of the fourth amendment suggests that the important rights it protects would be undercut by the subsequent use of illegally seized evidence. *Weeks v. United States*, 232 U.S. 383, 393 (1914).

Second, in *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961), this Court explicitly recognized that the suppression of evidence obtained in violation of the fourth amendment is constitutionally mandated. The Court emphasized that the exclusionary rule was "an essential ingredient" of the privacy rights secured by the fourth and fourteenth amendments. As the Court noted, "[t]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[14] *Id. See also Ker v. California*, 374 U.S. 23, 30-31 (1963); *Weeks, supra*, at 393, 398; *Boyd v. United States*, 116 U.S. 616, 630 (1885); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

Finally, the failure of the founding fathers to spell out the rule of exclusion is not controlling. This Court has consistently enforced many other important rights that are not explicitly set forth in the Constitution. *See, e.g., Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (right to vote in state elections); *Douglas v. California*, 372 U.S.

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[14]We respectfully disagree with the government's characterization (Br. 31) of the holding in *Mapp* as the "plurality opinion." It is clear that *five* Justices held that suppression is constitutionally mandated in state court trials. *See* 367 U.S. at 655-56 (Clark, J., Brennan, J., and Warren, C.J.); *id.* at 666 (Black, J., concurring); *id.* at 666-72 (Douglas, J., concurring).

353 (1963) (right to court-appointed counsel on criminal appeal); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (indigent's right of access to state courts in divorce action); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) right to procreation); *Roe v. Wade*, 410 U.S. 113 (1973) (woman's right to abortion); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parent's right to direct upbringing of children); *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigent's right to trial transcript on criminal appeal).

CONCLUSION

When all the arguments are laid in, all the cases dissected, and all the policy considerations advanced, the question remains: How are cases like these to be decided? What should a judge use to make the decision? That process, at least to an outsider, still seems a mystery. *See generally* J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980). Even to an experienced insider the nature of the process is elusive and at times subjective. As Justice Cardozo observed, the judge

> must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales.

B. Cardozo, The Nature of the Judicial Process 162 (1960).

Although the government characterizes the proposed "good faith" test as a panacea for every perceived shortcoming—real or imagined—of the exclusionary rule, it fails to address the potentially disastrous implications of the two-tiered system. A "good faith" standard focusing on the officer's subjective intent will clog the courts with lengthy

and complex suppression hearings. A "good faith" test exempting magistrates from its purview will insulate fourth amendment violations from appellate review. And a "good faith" test acquiescing in unlawful conduct will signal law enforcement officers across the country that the fourth amendment need no longer be scrupulously respected.

It is possible, even likely, that brief writers who work long enough on their arguments eventually reach hyperbole. But it seems to us that the future of the fourth amendment is at stake in these three cases. We therefore ask that the "weight" that tips Justice Cardozo's "scales" be this Court's recognition of the need to preserve and enforce the fourth amendment. We ask that not in the name of "criminals" (Br. 22-23), but in the name of all citizens whose freedom will be enhanced and protected by such a ruling. For this and all the foregoing reasons, the judgments under review should be affirmed.

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